IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case no: 2019/17887

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

Signed: ……. Date: 14 October

In the matter between:

NEDBANK LIMITED **Applicant**

and

THULISILE MABASO **First Respondent**

KABELO STEVEN ZWANE **Second Respondent**

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy hereof to Caselines.

MOULTRIE AJ

[1] On 6 November 2019 his Lordship Mr Justice Millar granted an order against the second respondent, and on 24 February 2020 his Lordship Mr Justice Adams granted an order against the first respondent ("the previous orders"). These previous orders included declarations that each of the respondents' undivided shares in certain immovable property constituting their primary residence ("the property") were specially executable and authorised execution thereon with a reserve price of R596,305.99.

[2] Consequent upon the grant of the previous orders, the property was judicially attached and a public auction was conducted on 23 October 2020 by the sheriff for Roodepoort South. The sheriff's report submitted in compliance with Rule 46A(9)(d) indicates that the highest bid achieved at the auction was R300,000 and that, as a result, the property was not sold in execution. Although there is no indication of how many bids were received prior to the fall of the hammer or how hotly the auction was contested, it is apparent from the sheriff's report that it was attended by at least 35 identified bidders, each of whom put up a deposit of R10,000.

[3] The applicant now approaches this court in terms of Rule 46A(9)(c) for an order varying the previous orders so as to allow the property to be sold in execution without a reserve price. I am satisfied that this application is one that meets the formal requirements of the Rule.[1]

[4] The sole positive justification advanced by the applicant for not setting a reserve price is that it is "*hoped that more buyers will attend due to no reserve being set*". The applicant also refers in its founding affidavit to its earlier Rule 46A application attaching valuation report indicating the market value of the property to be R450,000.00 as of 13 March 2019 and a municipal account reflecting the municipal valuation to be R767,000, with outstanding rates and other dues as of April 2019 of R12,194.01. The only updated information furnished by the applicant is:

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[1] See *Changing Tides 17 (Pty) Ltd NO v Kubheka and Others* 2022 (5) SA 168 (GJ).

(a) a certificate of balance dated 15 September 2022, from which it appears that the full (accelerated) amount of the respondents' joint and several indebtedness to the applicant is R681,543.18, including arrears amounting to R212,614.49; and

(b) an allegation in the applicant's founding affidavit (which was deposed to on 27 November 2020) that the most recent payment received from the respondents was an amount of R2,000 on 21 July 2020.

[5] After referring to the sheriff's report (i.e. indicating the highest bid at the auction was R300,000), the applicant's deponent makes what I consider to be the reasonable assertion that "*the real life scenario of the sale in execution of 23/10/2020 is the clearest and most accurate indication yet of the property's value*". Confoundingly, the deponent then goes on to make the contradictory and obviously incorrect statement that "*by virtue of the onerous reserve price of the property no purchasers were interested in this property according to the return attached to the sheriff's report*". This, together with a failure to submit updated valuations and the other information referred to in Rule 46(9)(d) suggests a disquietingly cavalier approach to the matter on the applicant's part.

[6] The first respondent does not oppose the application, but the second respondent does. Although he states in his answering affidavit (deposed to on 26 March 2021) that he does not deny any of the allegations contained in the applicant's founding affidavit, the second respondent does state that he was able to pay an amount of R3,000 per month after securing employment in January 2021.

[7] Although he admits "*that this amount may not be adequate*", the second respondent sought to persuade me to set aside the orders of special executability granted in the previous orders. In response, the applicant contends that such a course of action is not open to me in this application because "*ability to pay is not a defence at this stage of the legal proceedings*".

[8] It is necessary at this juncture to observe that it was recognised by Fisher J in *Khubeka* that a Rule 36A(9)(c) application "*is of the nature of a*

reconsideration of the original application",[2] that "*a court is given a wide discretion"* under the rule,[3] and that "*the reconsideration application works from the perspective that there has been a change in the facts before the court*"[4] particularly in relation to the non-achievement of the reserve price, which "*triggers a right to a reconsideration of the matter so as to allow for the determination of a proposed way forward*".[5]

[9] The observation that "*[c]learly the execution should not be stymied by the failure to obtain a bid … This would be unfair to the applicant for execution*"[6] might potentially be read as implying an assumption by the court that it would not be open to a court hearing an application in terms of Rule 46A(9)(c) to reconsider the underlying order of special executability against the respondents' primary residence. If, however, that was indeed the view taken of the matter, I consider that it was an *obiter dictum* as it was neither the pertinent focus of the enquiry being undertaken nor the basis of the decision that was ultimately reached (i.e. declining to entertain the matters and make any orders in view of the irregularity of the proceedings for non-compliance with Rule 46A(9)(c)).

[10] On the other hand, in *Sheriff of the High Court, Pretoria East v Dos Reis*, Windell J seems to have accepted that it might indeed be open to a court to reverse an order of special executability in an application under Rule 46A(9)(c).[7] However, this too was *obiter*.

[11] In my view, the scope of Rule 46A(9)(c), in affording a court a wide discretion to "*order how execution is to proceed*", is indeed sufficiently broad to revisit the previously granted orders of special executability should it emerge from information brought to the attention of the court in the reconsideration

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2 *Changing Tides 17 (Pty) Ltd NO v Kubheka* (above) para 27.

3 Id, para 28.

4 Id, para 31.

5 Id, para 32.

6 Ibid.

7 *Sheriff of the High Court, Pretoria East v Dos Reis* 2021 JDR 2165 (GJ) para 19: the requirement in Rule 46A(9(c) that the court must order how execution is to proceed "*entails a reconsideration of the factors in subparagraph (b) as well as the courts powers under the Rule 46A*".

proceedings that the circumstances of the matter have changed to such an extent that such an order is no longer warranted, for example because there are indeed other satisfactory means of satisfying the judgment debt. Such an approach is consistent with the purpose of the Rule, which is to achieve an appropriate balance between the legitimate commercial rights of judgment creditors to payment and the equally legitimate rights of indigent debtors to housing under section 26 of the Constitution.[8] It seems to me that this underlying purpose should, and does, remain a central consideration to the very last possible moment. If a Rule 46A(4)(9) application presents a court with an opportunity to address an inappropriate imbalance that has emerged between the competing rights of the parties, that opportunity must be seized.

[12] That said, I do not consider that it would be appropriate to revisit the special executability orders in the circumstances of this case.

[13] The applicant belatedly filed a replying affidavit deposed to on 17 June 2021, having undertaken what it refers to as "*a bona fide attempt … to grant the Second Respondent an attempt to prove that he is serious about settling the arrears*". Although the precise steps taken in this regard are not disclosed, I consider that the late delivery of the affidavit should be condoned in view of the absence of any prejudice to the second respondent in the form of a delay, and the fact that the content of the replying affidavit is of assistance in the determination of this application.

[14] Of particular relevance is the statement in the replying affidavit that "*[a]s at date hereof the arrears are R146 215-60 representing 41.90 months. Instalment due is R3 489-61 and the last payment received was for an amount of R2 000-00 on 31/5/2021*".

[15] When I raised this somewhat out-of-date information with the second respondent who appeared in person at the hearing of the application, he assured me that he had been paying between R1,000 and R2,000 per month

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[8] The history of the rule, which has its genesis in a series of Constitutional Court and Supreme Court of Appeal judgments starting with *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) was recently summarised in Bestbier and Others v Nedbank Limited 2022 JDR 1636 (SCA) paras 8 to 15.

since early 2021. Assuming this to be correct, it is clear that although the second respondent has been making efforts to meet the instalments, the amount that he has been able to pay has consistently been considerably less than the required monthly instalment. This can only mean that the amount of the indebtedness has continued to increase, and that there remains no real prospect that the considerable arrears will be paid off in the absence of a sale of the property in execution. This is confirmed by the updated certificate of balance, which reveals that the respondents' arrears have grown from R146,215.60 to R212,614.49 in the period between June 2021 and September 2022.

[16] Simply put, I am persuaded that that there is indeed still no satisfactory means other than a sale of the property in execution of satisfying the judgments debts.

[17] I pause here to note that I do not think that it is open to me to make an order in terms of Rule 46(9)(e) that the property be sold to the person who made the highest bid at the auction. Not only do the conditions of the auction in execution attached to the sheriff's report expressly stipulate that the auction was subject to the reserve price, it is questionable (as was the case in *Changing Tides 17 (Pty) Ltd v Schuurman*)[9] whether the highest bidder, who is not a party to the current application, remains interested in pursuing the sale given the long period that has elapsed since the auction. Furthermore, the applicant itself does not appear to consider this as a possibility given that it specifically prays for an order declaring the sale in execution to be null and void. For his part, the second respondent contends that the property should not be sold in execution at all, and it is unknown what the attitude of the first respondent may be in this regard.

[18] I also do not think, upon a reconsideration of the factors in Rule 46A(9)(b), that it would be appropriate to allow a sale of the property in execution without a reserve price in the "*hope that this might attract more potential buyers*", as the applicant alleges. To the contrary, it is apparent from the sheriff's report that there was not insignificant interest in the property at the unsuccessful

9 *Changing Tides 17 (Pty) Ltd v Schuurman and Others* 2022 JDR 0891 (GP) para 5.2.

auction. Clearly a reserve price must be set.

[19] During argument, counsel for the applicant noted that the application of what she referred to as the "usual formula" (i.e. the average of the market valuation and the municipal valuation, less outstanding municipal charges, less 30%)[10] would produce a result of approximately R417,000. It must be noted, however, that this is based on figures are by now considerably out of date.

[20] In my view, the most sensible approach to the setting of the reserve price in the current matter is the statement in the founding affidavit that "*the real life scenario*" that played out at the auction "*is the clearest and most accurate indication yet of the property's value*". I agree. The reserve price should be set at the amount of the highest bid submitted at that auction, namely R300,000.

[21] With regard to costs, the applicant has not secured its primary relief in the form of an order authorising the sale of the property without a reserve price. The second respondent has also not achieved any substantial success in his contention that the orders of special executability should be set aside. In my view, it would not be appropriate for either party to be awarded the costs of this application and, as such, no order as to costs will issue.

[22] The following order is made:

1. The late filing of the applicant's replying affidavit is condoned.

2. The sale in execution of erf 9467 Dobsonville Ext. 3 Township, which took place on 23 October 2020 is declared null and void.

3. Paragraph 11 of the order of his Lordship Mr Justice Millar on 6 November 2019 granted as against the second respondent and paragraph 11 of order of his Lordship Mr Justice Adams on 24 February 2020 granted as against the first respondent are both varied to read as follows:

    "11. The reserve price is R300,000.00."

4. The respondents are advised that the provisions of section 129(3) and (4)

[10] See, for example *National Urban Reconstruction & Housing Agency NPC v Morula Resources CC* 2020 JDR 2473 (GJ) footnote 21.

of the National Credit Act 34 of 2005 (“the NCA”) apply to the judgements granted in favour of the applicant. The respondents may prevent the sale of the property if (prior to the property being sold in execution) they pay to the applicant the amount that is overdue, together with the applicant’s prescribed default administration charges and reasonable costs of enforcing the credit agreement up to the time the default was remedied.

5. The amount that is overdue referred to in paragraph 4 above may be obtained from the applicant. The respondents are advised that the amount that is overdue is not necessarily the full amount of the judgment debts, but is the amount owing by the respondents to the applicant without reference to the accelerated amount.

6. A copy of this order is to be served personally on the respondents as soon as is practicable after the order is granted and in any event prior to any sale in execution.

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RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD:	3 October 2022
JUDGMENT SUBMITTED FOR DELIVERY:	14 October 2022

APPEARANCES

For the Applicant:	R Carvalheira, instructed by Hammond Pole Majola Inc.
For the Second Respondent:	In person